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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 382

UNIVERSAL CARLOADING & DISTRIBUTING COMPANY, INC., *Petitioner*

v.

REA FORHAN PEDRICK, as Administratrix of the ESTATE OF WILLIAM J. PEDRICK, Deceased,

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES; GEORGE M. HARRISON, President of said Brotherhood; and CARL BIER, General Chairman of said Brotherhood on the Property of Universal Carloading & Distributing Company, Inc.

and Two Other Cases

(Consolidated causes)

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF FOR THE RESPONDENT PEDRICK IN OPPOSITION

OPINIONS BELOW

The opinion of the Court of Appeals (R. 976-979) is reported at 184 F. 2d 64. The findings of

fact and conclusions of law (R. 920-951) and accompanying opinion of the District Court (R. 872-919) are not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on June 26, 1950. (R. 980.) By an order dated September 8, 1950, Mr. Justice Vinson extended the time for filing a petition for a writ of certiorari to and including October 24, 1950. The petition for a writ of certiorari was filed on October 24, 1950. The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTION PRESENTED

Is a freight forwarding company controlled by a railroad an "employer" within the meaning of Section 1532(a) of the Internal Revenue Code and so subject to the tax imposed on employers under the Railroad Retirement Tax Act, and not to the tax imposed on employers generally under the Federal Insurance Contributions Act.

STATUTE INVOLVED

Internal Revenue Code:

SEC. 1532. DEFINITIONS.[1]

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[1] This section is the same as Section 1 of the Carriers Taxing Act of 1937, c. 405, 50 Stat. 435, applicable prior to 1939, from which it was taken, and also is the same as the definition of "employer" in the Railroad Retirement Act of 1937, c. 382, 50 Stat. 307, Sec. 1, and in the Railroad Unemployment Insurance Act of 1938, c. 680, 52 Stat. 1094, Sec. 1, for the purposes of the retirement and unemployment benefits provided under the latter Acts.

As used in this subchapter—

(a) *Employer.*—The term "employer" means any carrier (as defined in subsection (h) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer:

* * * * *

(g) *Company.*—The term "company" includes corporations, associations, and joint-stock companies.

(h) *Carrier.*—The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(i) *Person.*—The term "person" means an individual, a partnership, an association, a joint-stock company, or a corporation.

(26 U. S. C. 1946 ed., Sec. 1532.)

STATEMENT

This proceeding involves three suits brought by Universal Carloading & Distributing Company, Inc., herein sometimes referred to as the taxpayer, against the Collector of Internal Revenue for the Second Collection District of New York, whose administratrix since has been substituted, to recover amounts paid as tax and interest under the Railroad Retirement Tax Act[2] which it alleges to be in excess of amounts for which it would be liable under the Federal Insurance Contributions Act,[3] all of which actions were consolidated in the District Court for trial, and are before this Court on a single record. (R. 1-4, 5-10, 33-44, 48-56, 59-60, 866-868.) The taxes involved cover periods from July 1, 1939, through December 31, 1946.[4]

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[2] Section 1538 was added to the Internal Revenue Code by Section 3(g) of the Act of July 31, 1946, c. 709, 60 Stat. 722, designating Subchapter B of Chapter 9 of the Code (Sections 1500-1532) as the Railroad Retirement Tax Act, and it will be so referred to herein.

[3] Internal Revenue Code, Chapter 9, Subchapter A, Sections 1400-1432.

[4] The first suit (R. 5-10) was for $488,908.60 paid as additional tax and interest for the taxable periods July 1, 1939, through December 31, 1941, which was based on taxing the taxpayer under the Railroad Retirement Tax Act rather than under the Federal Insurance Contributions Act (Internal Revenue Code, Sections 1400-1432), and included amounts paid by its employees. The second suit (R. 33-44) is for the sum of $382,916.95 for the years 1942 and 1943, and the third suit (R. 48-56) was for a total of $730,679.88 (including $321,494.26 paid on behalf of 3,909 employees from whom it had obtained consents to the refund), the amounts claimed

After a lengthy trial, the District Court made extensive and detailed findings of fact (R. 920-949). So far as material, the facts are, briefly, as follows: The taxpayer is a Delaware corporation organized as an operating company in December, 1925, by United States Freight Company, which had in turn been organized in May, 1925, as a holding company to acquire the stock of three freight forwarding companies. The taxpayer took over the freight forwarding business of these three predecessor companies. All of the taxpayer's stock, except qualifying shares of directors, has been owned by United States Freight Company since its organization. (R. 920-921.)

Since January 1, 1926, when it began operations, the taxpayer has been an operating company exclusively in the business of freight forwarding as that business has since been defined in Part IV of the Interstate Commerce Act (R. 921), as added by Section 1 of the Act of May 16, 1942.[5] By means not now material the New York Central Railroad Company had by the end of 1931 indirectly acquired a majority of the stock of United States Freight Company (R. 925-927), and the District Court found (R. 935) that in the period

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in both suits representing the difference between amounts paid under the Railroad Retirement Tax Act and the amounts admitted to be due under the Federal Insurance Contributions Act.

[5] c. 318, 56 Stat. 284.

from 1930 to June 15, 1939, the New York Central actually and affirmatively exercised its power of control over the taxpayer in many ways. The District Court further found (R. 938) that during the period from July 1, 1939, to December 31, 1946, the New York Central "actually controlled" the taxpayer, and this finding was upheld by the Court of Appeals (R. 979). The taxpayer does not now question this finding so far as control by a railroad is material to a determination of the question here involved. (Pet. 5, fn. 3.)

As stated above, and as indicated by its name, the taxpayer is engaged primarily in the business of a freight forwarder, and since September 18, 1943, following the enactment of Part IV of the Interstate Commerce Act, has operated under and pursuant to a permit issued to it as a freight forwarder under that Act. Its operations throughout the period here involved are described in detail in the District Court's findings (R. 938-943). The Court concluded (R. 943) that a "major part" of the activities of the taxpayer "are activities which could be performed by railroads, and are activities in connection with the transportation of property by railroad for which the railroad could make a charge." The court also found that a substantial amount of the taxpayer's activities "consisted of loading and unloading their carload freight for Central in New York, and for the Reading Railroad at Philadelphia, under tariffs

in which the railroads obligated themselves to perform such services." (R. 943-944.)[6]

Finding that the taxpayer was controlled by the New York Central Railroad Company during the tax periods here involved, and that it performed services which could be performed by a railroad, the District Court held that the taxpayer was an "employer" within the meaning of the Railroad Retirement Tax Act and was liable for the tax imposed by that statute. (R. 872-919). The Court of Appeals affirmed this determination. (R. 976-979).

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[6] Briefly, the activities of the taxpayer, as found by the court (R. 938-943) and not questioned by the taxpayer, consist principally of assembling and consolidating shipments of package goods of less than carload lots and less than truck load lots into carload lots or truck load lots for shipment from one city to another. Taxpayer utilizes the services of rail, motor, and water carriers, or a combination thereof, for such transportation between its freight stations (called "long-haul transportation") and the services of motor carriers almost exclusively for pick-up from the shipper and delivery to the ultimate consignee (called "local cartage" when within the same metropolitan district as the station and "off-line transportation" when outside such district). Taxpayer assumes responsibility for the transportation of such property from the point of receipt to the point of destination. The activities of the taxpayer, one of the larger freight forwarding companies, are similar to those enumerated by this Court in *United States* v. *Chicago Heights Trucking Co.*, 310 U.S. 344, 345-346, and *Chicago etc.* v. *Acme Freight*, 336 U.S. 465, 467. See, also, *Universal C. & D. Co.* v. *Railroad Retirement Bd.*, 172 F. 2d 22, 23-24 (C.A. D.C.), describing the services of this taxpayer.

ARGUMENT

The question presented by this case is whether a freight forwarding company controlled by a railroad is an "employer" within the meaning of Section 1532(a) of the Internal Revenue Code, which would make it liable during the periods involved for the tax imposed by the Railroad Retirement Tax Act. This question has not been raised by any company other than petitioner,[7] and has previously been decided adversely to petitioner by the Court of Appeals for the District of Columbia Circuit. *Universal C. & D. Co.* v. *Railroad Retirement Board,* 172 F. 2d 22 (C.A. D.C.)

The statute defines "employer" as including any company "controlled" by a carrier by railroad and which "operates any equipment or facility or performs any service * * * in connection with the transportation of * * * property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad * * * ." Since petitioner no longer challenges the finding of the two lower courts that it is controlled by the New York Central Railroad, the only issue remaining is whether it "performs any service * * *

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[7] We are advised by the Interstate Commerce Commission that the reports filed with it show that five other freight forwarding companies are controlled by railroads. Two of these companies are affiliated with petitioner and the other three are controlled by a single railroad and are affiliated with each other.

in connection with the transportation of * * * property by railroad, or the receipt, delivery * * * or handling of property transported by railroad".

1. Certainly, as a literal matter, there can be no question that a substantial part of petitioner's activities are performed "in connection with the transportation of * * * property by railroad", and also in connection with "the receipt, delivery, * * * or handling of property transported by railroad". This is clearly true of the substantial portion of petitioner's activities which consist of the loading and unloading of carload freight. (R. 943-944). In *Railroad Retirement Board* v. *Duquesne Warehouse Co.*, 326 U. S. 446, 454, the Court stated that the test under this provision of the statute was—

> * * * whether a carrier's affiliate is performing a service that could be performed by the carrier and charged for under the line-haul tariffs. * * * In other words if a service is involved which the railroad could perform as a part of its transportation service, it is within the present Acts. It then makes no difference that it is performed by a carrier affiliate rather than by the carrier itself. We think it plain that the definitions in question include at the very least those activities which would be transportation services when performed by a railroad but which it chooses to have performed by its affiliate.

Although petitioner attempts to distinguish the *Duquesne* case on the facts, the primary difference is, as the court below noted (R. 979), that in addition to loading and unloading "Universal performs many other services which could be performed by railroads in connection with the transportation of property and for which the Railroad could make a charge." But this difference hardly helps the petitioner.

Petitioner argues that the principle of the *Duquesne* case should not be applied to freight forwarders since railroads cannot lawfully engage in the business of freight forwarding.[8] But even if the railroads may not be able to enter into the freight forwarding business, they clearly can undertake to perform a great many of the operations in which a freight forwarder engages. And since the enactment of Part IV of the Interstate Commerce Act, the railroads are permitted to control freight forwarders, and thus to perform such services through an affiliated company. Interstate Commerce Act as amended by the Act of May 16, 1942, Sections 410(c), 411(g), 56 Stat. 284, 291, 294, 49 U. S. C. §§ 1010(c), 1011(g). Certainly, the definition of employer in the Retirement Tax Act is broad enough to include the activities of such a controlled freight

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[8] See Interstate Commerce Act, as amended, Section 410(c), 56 Stat. 291, 49 U.S.C. § 1010(c); *Merchants Warehouse Co.* v. *United States*, 283 U. S. 501, 510.

forwarder—even more clearly than in the *Duquesne* case—and nothing in the Interstate Commerce Act before or after the 1942 amendment purports to limit the definition in the Retirement Tax Act and related legislation so as to exclude freight forwarding companies controlled by carriers.

2. *Allen* v. *Ocean S. S. Co. of Savannah,* 123 F. 2d 469 (C. A. 5), and *Walling* v. *Baltimore Steam Packet Co.,* 144 F. 2d 130 (C. A. 4), relied upon as being in conflict with the decision below (Pet. 24-26), involved water carriers controlled by railroads, and are distinguishable, as Judge Frank of the Second Circuit pointed out in his dissenting opinion in one of the *Duquesne* cases (148 F. 2d 473, 488), in that the legislative history of the several acts may be deemed to exclude railroad owned water carriers. Those cases held the definitions in the retirement and related legislation inapplicable to a steamship company on the ground that it was "a part not of the railroad but of the maritime industry of the country" (123 F. 2d at 471). This is not true of freight forwarders such as petitioner, whose operations are much more clearly "in connection with" transportation by rail than the activities of steamship companies. A freight forwarder is not engaged in a separate kind of transportation, such as is a water or motor carrier, but in an activity ancillary to the principal form of transportation. It is also to be noted that both

of the cases alleged to be in conflict were decided prior to the decision of this court in the *Duquesne* case, and that they were just as pertinent in that case as in the case at bar.

3. The legislative history reviewed by petitioner has already been considered by this Court in the *Duquesne* case (326 U. S. at 451-452). The decision of the National Labor Relations Board in a representation proceeding involving petitioner[9] did not purport to construe the parallel definition in the Railroad Labor Act, inasmuch as petitioner conceded that it was subject to the National Labor Relations Act, and no one contended otherwise.

4. The decision below affects the status only of employees of freight forwarding companies controlled by railroads. Petitioner has not suggested that there are many other such companies, and the information furnished to us by the Interstate Commerce Commission indicates that there are very few. See p. 8, note 7. Whether such companies are subject to one social security system or another would seem clearly to be of no more consequence than the questions of social security coverage with respect to which this Court denied certiorari in *Fahs* v. *Economy Cab Co.* and *United States* v. *Party Cab Co.*, 338 U. S. 818, and *Finnegan* v. *Dimmitt-Rickhoff-Bayer Real Estate Co.*, certiorari denied, October 9, 1950, this Term.

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[9] *In re Universal C. & D. Co.*, 77 N.L.R.B. 1148.

CONCLUSION

The decision below is correct. It is supported by the only other decision in point, and is not in conflict with any case. The petition for a writ of certiorari should be denied.

Respectfully submitted,

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November, 1950

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